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No. - .

Supreme Court, U.S.
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In the

Supreme Court of the United States.

OCTOBER TERM, 1989.

ANTONIO JAVIER GARCIA,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

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Questions Presented for Review.

I. Whether the Confrontation Clause of the Sixth Amendment to the United States Constitution is violated by prohibition of cross-examination of alleged accomplice witnesses relative to terms in their plea agreements with the government which require, as an express condition precedent to the receipt of the benefits of their bargains, that they successfully complete polygraph examinations, where those witnesses had failed their polygraph examinations and then testified against petitioner while the government's option to abrogate their agreements remained open to it, rendering such failure highly probative evidence on the question of witness bias and continuing motivation to testify favorably to the government.

II. Whether 18 U.S.C. § 4205(b) authorizes or permits a sentencing judge to order that parole eligibility be postponed beyond the ten-year maximum specified in 18 U.S.C. § 4205(a).

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ANTONIO JAVIER GARCIA,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

Petitioner Antonio Javier Garcia prays that this Honorable Court grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case on May 15, 1989.

Opinions Below.

Petitioner's appeal from his conviction was heard by a panel of the Fourth Circuit which affirmed petitioner's conviction on May 15, 1989, in an unpublished *per curiam* opinion, which

is reproduced in the Appendix hereto at 2a. On June 12, 1989, the Court denied Garcia's Petition for Rehearing and Suggestion for Rehearing in Banc. Appendix at 1a.

Jurisdiction.

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on May 15, 1989. A timely petition for rehearing en banc was denied on June 12, 1989.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved.

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions th accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

18 U.S.C. § 4205 provides,[1] in pertinent part:

> (a) Whenever confined and serving a definite term or terms of more than one year, a prisoner shall be eligible for release on parole after serving one-third of such term or terms or after serving ten years of a life sentence or of a sentence of over thirty years, except to the extent otherwise provided by law.
>
> (b) Upon entering a judgment of conviction, the court having jurisdiction to impose sentence, when in its opinion the ends of justice and best interest of the public require that the defendant be sentenced to imprisonment for a term exceeding one year, may (l) designate in the sentence of imprisonment imposed a minimum term at the expiration of which the prisoner shall become eligible for parole, which term may be less than but shall not be more than one-third of the maximum sentence imposed by the court, or (2) the court may fix the maximum sentence of imprisonment to be served in which event the court may specify that the prisoner may be released on parole at such time as the Commission may determine.

Statement of the Case.

Petitioner Antonio Javier Garcia was the subject of a four-count indictment returned in the District of South Carolina on December 2, 1987, which charged him in Count 1 with con-

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[1] Section 4205 was repealed effective November 1, 1987, Pub.L. 98-473, Title II, § 218(a)(5), 98 Stat. 2027, but by virtue of the saving provisions of § 235 of the Sentencing Reform Act remains in effect until 1992 as to persons similarly situated to petitioner who were sentenced under prior law. See Section II, *infra*.

spiracy to possess with intent to distribute and to distribute cocaine in the District of South Carolina and elsewhere from an unknown date in 1983 to February, 1987, and in Counts 2-4 with the substantive possession with intent to distribute and distribution of cocaine in the District of South Carolina in August, 1985, and in February and October, 1986 (R.A. 7).[2] The case was tried before Hon. Charles E. Simons and a jury on March 8-10, 1988. The jury returned a verdict of guilty on all counts.

The government's case at trial rested virtually exclusively upon the testimony of four heavily rewarded accomplice witnesses testifying for the government pursuant to plea agreements. The plea agreements of two of these witnesses, Richard Brittingham and Gerald Weathersbee, executed in August, 1987, contained the following identical provisions:

> The Defendant . . . further agrees to submit to polygraph examination(s) by any qualified federal polygraph examiner regarding the knowledge of, or involvement in, drug-related activities or other related unlawful activities, by himself or others, and regarding any and all assets and conveyances acquired and/or used by the Defendant or others, whether drug related or not. This plea agreement is expressly contingent upon successful completion to the Government's satisfaction of the polygraph examination(s).

(R.A. 114H, 114O). Both Brittingham and Weathersbee had been administered, but had failed to successfully complete, polygraph examination(s) (R.A. 114A).[3] At the time of their

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[2] "R.A." as used herein refers to the Record Appendix filed with the Fourth Circuit Court of Appeals in conjunction with petitioner's direct appeal of his conviction to that Court.

[3] Brittingham had been tested three times in February, 1987, during which the examiner concluded that his responses were deceptive to the following questions:

trial testimony against petitioner, neither man had yet been sentenced, and the government's option to rescind their plea agreements remained open.

Petitioner had raised this issue prior to trial in his Motion in Limine to Allow Examination of Government Witnesses Regarding Polygraph Examinations, along with a supporting memorandum of law (R.A. 12, 14), in which he contended that the opportunity to cross-examine these witnesses regarding the polygraph provisions of their plea agreements was essential impeachment evidence relative to the witnesses' incentive to testify favorably to the government. That motion was heard prior to trial by Judge Simons (R.A. 87-93), who expressed his "strong feelings" regarding polygraph testing and ordered defense counsel, upon pain of "serious sanctions," not to so

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1. Are you lying about your part in those drug deals?
2. Are you lying to cover for anyone involved in those drug deals?
3. Are you lying about what happened to any of that cocaine?
4. Have you lied about your cocaine activities?
5. Are you lying about your knowledge of others dealing in cocaine?
6. Are you now lying about any of your cocaine deals?
7. Are you lying to me about any of your drug activities?

(Supp. Jt. App. at 10-12).

Weathersbee was tested in South Carolina only a month prior to the execution of his plea agreement, and his responses were found to be deceptive to the following questions:

Are you lying about being a driver in that cocaine operation?
Are you lying about your job in that cocaine ring?
Are you withholding information about any assets you have gained from smuggling drugs?
Are you now hiding any assets you have gained from drug profits?

(Supp. Jt. App. at 16). Notwithstanding the unequivocal failures of these witnesses to "successfully complete" polygraph examinations, the government chose to insist that the plea agreements include provisions making such successful completion an explicit condition precedent to the receipt of the substantial benefits conferred upon both witnesses by their agreements.

The other two cooperating witnesses, Richard Hunt and Miguel Valdes, were not tested (R.A. 114A), despite the presence of similar provisions in their agreements.

much as allude to polygraph testing in any manner, casting the issue in terms of the competency of such proof as substantive evidence of credibility (R.A. 87-88). At trial, the government elicited from each of its accomplice witnesses a lengthy litany of all the dire consequences which would befall them under the terms of their agreements should their testimony stray from the truth (R.A. 162-64, 254-57, 448-50, 550-52) and then argued repeatedly to the jury that these witnesses should be believed because of the powerful truth-telling incentives embodied in their plea agreements (R.A. 685-86, 687, 713-14, 719, 721),[4] while defense counsel, consistent with the court's prohibition, was unable to cross-examine Brittingham and Weathersbee as to their understanding of the potential adverse ramifications of the government's explicitly reserved power to seek to abrogate their plea agreements.

Upon his conviction, Garcia was sentenced on Count 1 to a term of 60 years, and a fine of $4,000,000 was imposed; on each of Counts 2-4 a sentence of 20 years' imprisonment was imposed, concurrent with each other but consecutive to the sentence imposed on Count 1. All sentences were imposed pursuant to 18 U.S.C. § 4205(b), with the proviso that Garcia not become eligible for parole until he had served 18 years (R.A. 10).

On appeal, the Fourth Circuit held that the dictates of the Confrontation Clause did not compel departure from its generalized prohibition against the introduction of any reference to polygraphy or its results in a given case. App. 4a-5a. As to parole eligibility, the Court concluded that 18 U.S.C. § 4205(b)(1) did empower a sentencing judge "to set a defendant's eligibility for parole at any point up to one-third of a definite term of years imposed," and accordingly, that Garcia's 18-year eligibility date, being less than one-third of the term

[4] The plea agreements themselves were neither offered nor admitted into evidence.

imposed, was permissible notwithstanding the ten-year maximum provided by § 4205(a).

Reasons Why the Writ Should Be Granted.

I. THE DECISION OF THE FOURTH CIRCUIT PRECLUDING DEFENSE COUNSEL FROM ADVERTING TO THE WITNESSES' FAILURE TO SUCCESSFULLY COMPLETE POLYGRAPH EXAMINATIONS FOR THE PURPOSE OF DEMONSTRATING TO THE JURY A POTENTIAL SOURCE OF BIAS AND MOTIVATION TO TESTIFY FAVORABLY TO THE GOVERNMENT IS CONTRARY TO SEVERAL DECISIONS OF THIS COURT CONSTRUING THE REACH OF THE SIXTH AMENDMENT CONFRONTATION CLAUSE AND IS IN CONFLICT WITH THE DECISION OF ANOTHER CIRCUIT AS TO THIS PRECISE ISSUE.

Introduction.

Antonio Garcia stands convicted and sentenced based upon the testimony of heavily rewarded government witnesses testifying pursuant to plea agreements which uniformly contained the requirement that each of them, as an express condition precedent to their receipt of the benefits conferred by the bargain take and successfully complete a polygraph examination. Having ascertained pretrial that Richard Brittingham and Gerald Weathersbee, two crucial witnesses against Garcia, had not successfully completed the polygraph examinations administered to them, having in fact flatly "failed" their tests, defense counsel sought to elicit from each of these two witnesses his understanding of that portion of the plea agreement,

whether such an examination had been administered, and what the results of the examination had been, *not* for the substantive purpose of suggesting to the jury that the witnesses were not to be believed because they had failed polygraph examinations, but rather for the purpose of elucidating for the jury the fact that these witnesses *knew* during the course of their trial testimony that by virtue of their failure to pass polygraph examinations the government possessed the power to unilaterally abrogate their plea bargains, subjecting them to the potential of significantly enhanced criminal liability and the virtual certainty of considerably longer terms of imprisonment than they would otherwise face, a power which it had not yet chosen to exercise but which hung throughout their testimony like a Damoclean sword which could fall with devastating consequences if their testimony displeased the government. A more powerful incentive to favor the government and implicate the petitioner than the *present* and *continuing* knowledge that the government could abrogate the agreement at any time is difficult to imagine.

The constitutionally fatal detriment to Garcia and to the all-important ability of the jury to accurately assess the credibility of these witnesses arising from the court's prohibition of any reference to the polygraph provisions of these agreements was that the government was free to elicit, at the outset of its examination of each witness a litany of the witness' understanding of the adverse consequences attendant upon a failure to cooperate fully and truthfully — invalidation of the agreement, a resurrection of all the charges which the government had agreed to dismiss, possible prosecution for previously uncharged offenses which their cooperation had disclosed to the government, and potential prosecution for perjury — and then to argue to the jury, knowing full well that Weathersbee and Brittingham had failed to pass polygraph examinations, a condition precedent to their agreements, that these witnesses

should be believed because of the powerful truth-telling incentives embodied in their plea agreements, yet the defendant was left powerless to demonstrate to the jury that these witnesses had at least an equally powerful motive to provide testimony favorable to the government, *regardless of its truth*: every dire consequence which the government argued to the jury could befall the witness if he failed to tell the truth would also happen to him if the government exercised its preexisting power to abrogate the plea agreement because it was dissatisfied with his performance on the witness stand.

While the employment of similar polygraph conditions in plea agreements is a widespread practice in federal prosecutions throughout the country, the federal courts have uniformly adopted a hostile stance toward the admissibility of or even reference to polygraph results, with some circuits leaving the question within the discretion of the trial judge with the proviso that the discretion to admit such evidence should only sparingly be exercised and some, including the Fourth Circuit, having pronounced a *per se* rule of exclusion for all purposes. The routine inclusion by the government of such polygraph contingencies in plea agreements, with its unavoidable corollary that alleged accomplices will fail polygraph examinations but will nonetheless be called as witnesses by government prosecutors generates a substantial conflict of increasingly serious importance to the fair administration of criminal justice in the federal courts, and one which should be addressed by this Court, between the strong resistance on the part of federal judges generally toward evidentiary references to polygraph testing and the mandate of the Sixth Amendment Confrontation Clause that a criminal defendant must be permitted to explore potential sources of bias in the witness and his incentives to testify favorably to the government to highlight for the jury the influences which these factors may have exerted upon the manner and substance of his testimony. Under such circum-

stances the Confrontation Clause must prevail, and the decision of the Fourth Circuit in this case is not only clearly contrary to well-established precedent of this Court, *e.g.*, *Davis* v. *Alaska*, 415 U.S. 308 (1974), but also is in direct conflict with the decision of the First Circuit Court of Appeals in *United States* v. *Lynn*, 856 F.2d 430 (lst Cir.1988).

A. *The Decision of the Fourth Circuit is Contrary to* Davis *v.* Alaska *and Other Decisions of this Court Relative to the Mandate of the Confrontation Clause That a Criminal Defendant Be Permitted Wide Latitude to Expose Potential Sources of Bias and Motivation In Adverse Witnesses.*

The inquiry which was foreclosed in this case went to the very heart of the protections guaranteed by the Confrontation Clause, the right to expose a witness' bias and motivation for testifying favorably to the government. "[T]he exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." *Delaware* v. *Van Arsdall*, 475 U.S. 673, 678 (1986). Bias is "always relevant as discrediting the witness, and affecting the weight of his testimony." *Davis* v. *Alaska*, 415 U.S. 308, 315 (1974).

"[A] criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby 'to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness.'" *Delaware* v. *Van Arsdall*, 475 U.S. at 680, *quoting Davis* v. *Alaska*, 415 U.S. at 318. Such a showing was persuasively made by petitioner in this case. Each of these

witnesses had a powerful bias and motive to testify favorably to the government. From the moment they failed their polygraph examinations, the government had the power to rescind any and all benefits contemplated by their agreements, which at a minimum would subject the witnesses to prosecution for the myriad of offenses with which they had originally been charged, carrying with it exponentially increased exposure to the maximum penalties provided. While the government succeeded in suggesting to the jury that the *in terrorem* effect of the plea agreements would preclude deviation from the truth, what the jury did *not* hear was that there was a countervailing, and at least equally powerful, motivation at work here.

Evidence of the failure of these witnesses to successfully complete polygraph examinations constituted entirely proper and probative evidence as to a prototypical form of bias,[5] the exclusion of which was highly prejudicial constitutional error. By "cutting of all questioning about an event . . . that the jury might reasonably have found furnished the witness a motive for favoring the prosecution in his testimony, the court's ruling violated [Garcia's] rights secured by the Confrontation Clause." *Delaware* v. *Van Arsdall*, 475 U.S. at 679.

In rejecting petitioner's argument, the Fourth Circuit invoked its previously articulated *per se* rule of exclusion of any and all evidence relating to polygraph testing, *see*, *e.g.*, *United States* v. *Brevard*, 739 F.2d 180, 182 (4th Cir. 1984), a rule which has its genesis in the extreme skepticism with which the federal courts have uniformly viewed the scientific reliability of polygraphy.[6] See Section I(B), *infra*. However, where

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[5] This Court has defined bias as "the relationship between a party and a witness which might lead the witness to slant, unconsciously or otherwise, his testimony in favor of or against a party." *United States* v. *Abel*, 469 U.S. 45, 52 (1984).

[6] As a corrollary of its *per se* rule, the Fourth Circuit has also instructed that plea agreements containing references to polygraph examination should be

strict adherence to a blanket prohibition against reference to polygraph examination or introduction of the results of polygraph examination would preclude exposure of such a potent source of bias in the witness, the mandate of the Confrontation Clause must take precedence. The fundamental flaw in the reasoning of the Fourth Circuit lies in its failure to accord proper weight to petitioner's Sixth Amendment right "to be confronted with the witnesses against him" which is inherent in its conclusion that the rights guaranteed by the Sixth Amendment Confrontation Clause may be superceded by an evidentiary ruling of general applicability.

> [T]here is no rule of evidence which provides that testimony admissible for one purpose and inadmissible for another purpose is thereby rendered inadmissible; quite the contrary is the case. *It would be a strange rule of law which held that relevant, competent evidence which tended to show bias on the part*

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redacted to eliminate any such provisions prior to their submission to the jury. *See, e.g., United States* v. *Herrera*, 832 F.2d 833, 835 (4th Cir. 1987); *United States* v. *Porter*, 821 F.2d 968, 974 (4th Cir. 1987), *cert. denied*, 108 S.Ct. 1108 (1988); *United States* v. *Tedder*, 801 F.2d 1437, 1444 (4th Cir. 1986), *cert. denied*, 480 U.S. 938 (1987). The theory underlying this rule is that inclusion of such provisions by the government constitutes improper bolstering of the witness' testimony, *e.g., United States* v. *Herrera, supra*, whether the witness actually successfully completed the examination or merely represented his willingness to undergo polygraph examination to substantiate his statements. The danger to the fairness of the proceedings under such circumstances is obvious in that such provisions invite the jury, based upon an assumption as to the scientific reliability of polygraphy (an assumption given credence by the government's apparent faith in the process as a means of verifying the truthfulness of its witnesses), either to infer that the witness must have actually taken and passed the examination, *United States* v. *Tedder, supra*, or that his stipulated willingness to submit to a test which would reveal any falsehoods provides its own guarantees of truthfulness. *See, e.g., United States* v. *Hilton*, 772 F.2d 783, 786 (11th Cir. 1985); *United States* v. *Brown*, 720 F.2d 1059, 1072-1074 (9th Cir. 1983); *United States* v. *Bursten*, 560 F.2d 779, 785 (7th Cir. 1977). Such concerns are not, of course, implicated where the witness has taken and *failed* a polygraph examination.

of a witness was nonetheless inadmissible because it also tended to show that the witness was a liar.

United States v. *Abel*, 469 U.S. 45, 56 (1984).

The decision of the Fourth Circuit in this case is contrary to numerous decisions of this Court which have recognized that regardless of the general inadmissibility of a particular category of evidence or the state interests or public policy concerns or prejudice/probative value calculus which might militate in favor of exclusion of the evidence in other contexts, where that evidence supplies the predicate for an inference by the jury that the circumstances disclosed by the evidence indicate a potential source of bias in the witness which could influence the manner or substance of his testimony, the defendant must be permitted to elicit that evidence on cross-examination. The leading example of this principle is, of course, the landmark case of *Davis* v. *Alaska*, 415 U.S. 308 (1974), in which this Court held that notwithstanding the general inadmissibility of juvenile records and the state's admittedly substantial interest in preserving the anonymity of juvenile offenders, the Confrontation Clause demanded that the defendant be permitted to cross-examine the witness regarding the fact that he was on juvenile probation at the time of the robbery with which the defendant was charged and at the time of his subsequent identification of the defendant, to develop the basis for an inference that the witness' probationary status made him vulnerable to pressure to implicate the defendant. Similarly, in *Delaware* v. *Van Arsdall*, 475 U.S. 673 (1986), this Court held that the Confrontation Clause was violated by the exclusion of cross-examination as to the government's dismissal of unrelated charges against the witness. *See also Alford* v. *United States*, 282 U.S. 687 (1931) (Confrontation Clause violated where defendant prohibited from eliciting on cross-examination that government witness was in witness protection program;

purpose of proposed examination was not to discredit witness by showing that he had been charged with a crime but rather to show that his testimony was biased "because given under promise or expectation of immunity or under the coercive effect of his detention by officers of the United States, which was conducting the present prosecution"). Most recently, this Court held in *Olden* v. *Kentucky*, 109 S.Ct. 480 (1988), that the defendant was denied his rights under the Confrontation Clause when he was precluded from eliciting from a white rape complainant testimony that she was cohabiting with a black man, in support of a defense theory that such cohabitation gave the witness a motive to claim forcible rape, as opposed to consensual conduct, for fear of jeopardizing her relationship, concluding that the Confrontation Clause vastly outweighed the State's concern that evidence of extramarital interracial cohabitation would prejudice the jury against the witness.

> The right of cross-examination . . . is implicit in the constitutional right of confrontation, and helps assure the accuracy of the truth-determining process. . . . It is, indeed, an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal. Of course, the right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process. . . . But its denial or significant diminution calls into question the ultimate integrity of the fact-finding process, and requires that the competing interests be closely examined.

Chambers v. *Mississippi*, 410 U.S. 284, 296 (1973). Those "competing interests," however, have never been found to exceed the traditional discretion of the trial judge to limit cross-

examination based upon "such factors as 'harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that [would be] repetitive or only marginally relevant,'" *Olden* v. *Kentucky*, 109 S.Ct. at 483, *quoting Delaware* v. *Van Arsdall*, 475 U.S. at 670, and certainly do not and cannot encompass a flat pronouncement such as that delivered by the Fourth Circuit in this case that a defendant's Confrontation Clause rights must give way in all cases, in all contexts, to a generalized rule of evidentiary exclusion. *Cf. Coy* v. *Iowa*, 108 S.Ct. 2798, 2803 (1988). Just as the general rules under which evidence concerning juvenile records, dismissed charges, or the details of a witness' extramarital relationships would normally be excluded must give way when in conflict with the guarantees of the Confrontation Clause, so too must general prohibitions or restrictions as to the admissibility of polygraph evidence.

The petitioner was deprived of significant impeachment evidence, and the error was compounded by the government's resultant freedom to present the jury with an entirely misleading assessment of the witnesses' incentive to tell the truth, a compelling, and potentially outcome-determinative, argument.[7]

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[7] The palpable unfairness of a ruling which would permit the government to tell the jury only half the story and preclude the defendant from supplying the rest is underscored by the fact that it is the government prosecutor who, in insisting upon the insertion of a polygraph requirement in the plea agreement, causes this issue to arise at all and who therefore holds the key to foreclosing the issue by foregoing a polygraph contingency.

Even where such provisions are included, they will remain in most cases entirely irrelevant to the question of witness bias and would remain encompassed within the prevailing rule of the circuit as to the admissibility of polygraph results or references to polygraphy. When the witness passes the polygraph, the question of witness bias or motivation does not arise, and the polygraph results would remain inadmissible. Similarly, if the witness failed the polygraph and the government exercised its option to abrogate the agreement, references to polygraphy would also be precluded, being unrelated to any unexplored source of witness motivation to curry favor with the government. However, in those cases in which the witness fails the polygraph but the government

This was a case about credibility, not only as to whether Garcia was the person who supplied Miguel Valdes with cocaine in Florida but also as to whether he entered into a conspiracy which would subject him to criminal liability in South Carolina. The testimony of the various witnesses conflicted in many essentials and, most critically, neither Hunt, Weathersbee, nor Brittingham had ever indicated to federal agents prior to the execution of their plea agreements that Garcia had been involved in these transactions (R.A. 219-20, 225-27, 491-92, 505, 581, 595). The fact that Weathersbee and Brittingham may have feared abrogation of their agreements would have provided powerful support for the central defense theory that the concerted accusation of Garcia by the witnesses was a recent contrivance orchestrated by Valdes which served the dual purpose of permitting the witnesses to give the government the testimony it wanted while deflecting the emphasis from, and concomitantly minimizing the role of, Valdes. *See, e.g.*, *Davis* v. *Alaska*, 415 U.S. at 317 ("the jurors were entitled to have the benefit of the defense theory before them so that they could make an informed judgment as to the weight to place on [the witness'] testimony which provided a crucial link in the proof"); *Alford* v. *United States*, 282 U.S. at 692 ("Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them").

> The question for the jury is what effect they think [the polygraph contingency] had on the mind and

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nonetheless uses the witness at trial with the option of abrogating or seeking to abrogate the agreement still open, the Confrontation Clause demands that the defendant be permitted to expose to the jury such a powerful bias and motive to testify favorably to the government. If government prosecutors are unhappy with this eventuality, they have only to eliminate the polygraph contingency, a truth-testing mechanism of dubious efficacy at best, from their plea bargain repertoire.

> conduct of a prisoner whose plea of guilty put him in large measure in the hands of the [government]. They might have regarded it as an incentive to involve others, and to supply a motive for the witness' testimony other than a duty to recount the facts as best he could remember them.

Gordon v. *United States*, 344 U.S. 414, 422 (1953). Here, the prosecution was free to pose the question to the jury as to what possible motive the witnesses had for pointing the finger at Garcia and implicating him in a South Carolina conspiracy if it were not true, and Garcia was powerless to answer: because the government wanted to prosecute Garcia and wanted to do it in South Carolina, and the potential price of not helping the government attain its end was the complete abrogation of their plea agreements.

B. *The Decision of the Fourth Circuit Conflicts with the Decision of the First Circuit Court of Appeals in* United States *v.* Lynn.

In the only reported federal decision to directly confront and decide this issue, the First Circuit held in *United States* v. *Lynn*, 856 F.2d 430, 432-34 (1st Cir. 1988), that the defendant's Sixth Amendment Confrontation Clause rights were violated by the exclusion of precisely the same inquiry sought to be pursued by Garcia, holding that

> especially broad latitude should be afforded the questioning of an accomplice now acting as a government witness which concerns "the nature of any agreement he has with the government or any expectation or

> hope that he will be treated leniently in exchange for his cooperation." . . . Cross-examination of this type might not only impeach the credibility of the witness' prior statements with the suggestion that he lied before to obtain a good deal with the government; it could also reveal any present and continuing reasons for the witness to fabricate future prosecutorial favors.
>
> In this case we are faced with the district court's complete foreclosure of cross-examination on the issue of [the witness'] polygraph examination. There is no question of the relevance of the intended area of inquiry — [the witness'] motivation to lie to continue to curry favor with the government.

Id. at 433 (citations omitted).[8]

Given the prevalence with which polygraph provisions are incorporated into plea agreements with cooperating witnesses in federal prosecutions, *see, e.g.*, *United States* v. *Lynn*, *supra*; *United States* v. *Herrera*, 832 F.2d 833 (4th Cir. 1987); *United States* v. *Porter*, 821 F.2d 968 (4th Cir. 1987), *cert. denied*, 108 S.Ct. 1108 (1988); *United States* v. *Whitt*, 718 F.2d 1494 (10th Cir. 1983); *United States* v. *Hilton*, 772 F.2d 783 (11th Cir. 1985); *United States* v. *Brown*, 720 F.2d 1059 (9th Cir. 1983); *United States* v. *Bursten*, 560 F.2d 779 (7th Cir. 1977); *United States* v. *Betancourt*, 838 F.2d 168 (6th Cir. 1986), *cert. denied*, 108 S.Ct. 1748 (1988), the issue raised in this

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[8] The *Lynn* court also pointed to the unfairness in permitting the government to introduce the unredacted plea agreement and then to object to defense efforts to expose the full implications of the agreement. *Id.* at 433. Here, while the government did not actually introduce the plea agreement document, it did elicit from each witness lengthy testimony about virtually all aspects of the agreement, with particular emphasis upon the purported truth-telling guarantee provisions, except of course for the all-important and countervailing, polygraph clause.

case and in *Lynn* can hardly be viewed as isolated idiosyncracies, and the question raised here and in *Lynn* will surely arise again and again.

The tension generated between polygraph contingency clauses contained in plea agreements and the mandates of the Confrontation Clause is a product of the pronounced inhospitability of the federal courts toward the admission of polygraph evidence. *See, e.g., United States* v. *Winter*, 663 F.2d 1120, 1150 (1st Cir. 1981), *cert. denied*, 460 U.S. 1011 (1983) (not deciding whether *per se* prohibition against use of polygraph tests is appropriate because judge did not abuse discretion in refusing to admit evidence); *deVries* v. *St. Paul Fire and Marine Ins. Co.*, 716 F.2d 939, 945 (1st Cir. 1983) (noting that polygraph evidence has long been considered of dubious scientific value and is usually labelled irrelevant by federal courts); *United States* v. *Bari*, 750 F.2d 1169, 1179 (2d Cir. 1984), *cert. denied*, 472 U.S. 1019 (1985) ("we have stated that polygraph evidence is speculative"); *United States* v. *Bursten*, 560 F.2d 779, 785 (3d Cir. 1977) (admissibility of polygraph results within discretion of judge, but noting that such evidence is consistently rejected in federal courts); *United States* v. *Tedder*, 801 F.2d 1437, 1444-45 (4th Cir. 1987), *cert. denied*, 480 U.S. 938 (1987) (*per se* rule excluding all reference to polygraphy); *United States* v. *Martino*, 648 F.2d 367, 390 (5th Cir. 1981), *cert. denied*, 456 U.S. 943 (1982); *United States* v. *Masri*, 547 F.2d 932, 936 (5th Cir.), *cert. denied*, 434 U.S. 907 (1977) (polygraph results unequivocally inadmissible); *United States* v. *Murray*, 784 F.2d 188 (6th Cir. 1986) (any introduction of polygraph material is error); *Simmons, Inc.* v. *Pinkerton's Inc.*, 762 F.2d 591, 604 (7th Cir. 1985) (admission or exclusion of polygraph evidence within the discretion of the trial judge, but noting that such discretion is most often exercised in favor of exclusion); *United States* v. *Oliver*, 525 F.2d 731, 736 (8th Cir. 1975), *cert.*

denied, 424 U.S. 973 (1976) (where admissibility of polygraph results stipulated by the parties, apply discretionary rather than per se exclusionary rule); *Brown* v. *Darcy*, 783 F.2d 1389, 1395 (9th Cir. 1986) (unstipulated polygraph evidence is inadmissible); *United States* v. *Falsia*, 724 F.2d 1339, 1341-42 (9th Cir. 1983) (trial court will rarely abuse its discretion by refusing to admit polygraph evidence, even for a limited purpose under limited conditions); *United States* v. *Hall*, 805 F.2d 1410, 1416-17 (10th Cir. 1986) (polygraph evidence not admissible to show that one is truthful but may be admissible for other limited purposes); *Brooks* v. *Scheib*, 813 F.2d 1191, 1194 (11th Cir. 1987) ("this circuit has been hostile towards admitting the results of polygraphs into evidence"); *United States* v. *Skeens*, 494 F.2d 1050, 1053 (D.C. Cir. 1974) (polygraph evidence inadmissible).

While decisions in a number of circuits, even those which have adopted a *per se* exclusion of polygraph results as substantive evidence, have concluded that polygraph references may nonetheless be admissible for other more limited purposes,[9] the decision of the Fourth Circuit in this case fails entirely to

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[9] *See, e.g., United States* v. *Whitt*, 718 F.2d 1494, 1501-02 (10th Cir. 1985) (recognizing that government witness' failure of polygraph "might have been useful to impeach witness"); *United States* v. *Greichunos*, 572 F.Supp. 220, 230 (N.D. Ill. 1983) (statements made during polygraph examination admissible as prior inconsistent statements); *United States* v. *Hall*, 805 F.2d 1410, 1418 (10th Cir. 1986) (where defense counsel attacked quality of government's investigation, defendant's failure of three polygraphs admissible to show case agent's state of mind as to reasons why he did not pursue other investigative avenues); *United States* v. *Kampiles*, 609 F.2d 1233, 1244 (7th Cir. 1979), *cert. denied*, 446 U.S. 954 (1980) (to rebut defendant's claim of involuntariness of confession, government may seek to demonstrate that defendant's failure of polygraph, rather than police coercion, precipitated confession); *United States* v. *Johnson*, 816 F.2d 918, 923 (3d Cir. 1987) (same); *United States* v. *Bad Cob*, 560 F.2d 877, 881-82 & n.10 (8th Cir. 1977) (same); *Tyler* v. *United States*, 193 F.2d 24, 31 (D.C. Cir. 1951), *cert. denied*, 343 U.S. 908 (1952) (same); *Rothgeb* v. *United States*, 789 F.2d 647 (8th Cir. 1986) (responses to questions asked during exam are admissible, as well as evidence as to defendant's demeanor during the exam).

appreciate the critical distinction between introduction of polygraph results as substantive evidence of credibility and the impeachment of a witness, guaranteed by the Confrontation Clause, by showing how and why the fact that he had not and probably could not fulfill a condition precedent of his plea agreement might impact on his continuing incentive to curry favor with the government. To this inquiry the scientific reliability of the polygraph is quite irrelevant — whether the failure was a "true" negative or a "false" negative, the impact upon the witness' state of mind as to the potential consequences which he perceives might flow from that circumstance and the undeniably powerful incentive thereby engendered to provide testimony favorable to the government remains the same.

The positions of the federal courts toward polygraph evidence are sufficiently fragmented and sufficiently ingrained that it may safely be predicted that decisions in future cases confronting this issue will vary according to the position on polygraph evidence previously adopted. A criminal defendant's ability under the Confrontation Clause to impeach a crucial witness against him as to a potent source or bias and motivation to testify favorably to the government arising from a failure to satisfy an express condition precedent of his plea agreement predicated upon successful completion of a polygraph examination cannot be left dependent upon the depth of animosity toward polygraph evidence prevailing in the circuit where he is tried. The critical importance of the Confrontation Clause in ensuring the integrity and accuracy of the truth-finding process demands the consistency which only review by this Court can supply. For all the foregoing reasons, this Court should grant certiorari to resolve the conflict between the decision of the Fourth Circuit in this case and that of the First Circuit in *United States* v. *Lynn*, *supra*.

II. There Is a Divisive Split Among the Circuits on the Issue of Whether a Sentencing Judge May Postpone Parole Eligibility Pursuant to 18 U.S.C. § 4205(b) Beyond the Ten-Year Maximum Eligibility Date Established By 18 U.S.C. § 4205(a) Which Should Be Resolved By This Court.

Garcia was sentenced to a term of imprisonment totalling 80 years with the express proviso, pursuant to 18 U.S.C. 4205(b)(l) that he serve at least 18 years before being considered for release on parole. The decision of the Fourth Circuit upholding the power of a sentencing judge to order, pursuant to 18 U.S.C. § 4205(b), that parole eligibility be delayed beyond the ten-year maximum established by § 4205(a),[10] conflicts not only with a number of well-reasoned decisions in other circuits but also with the legislative history underlying the enactment of § 4205. The extraordinary sentencing disparity resulting from the divisive conflict among the circuits on this issue, a disparity which will be perpetuated and, indeed, exacerbated, by the conversion to determinate sentences required under § 235(b)(3) of the Sentencing Reform Act, demands that this Court address and resolve this issue.

For 20 years following the enactment of 18 U.S.C. § 4205 in its present form, courts uniformly referred to § 4205(b)(l) as an early parole eligibility provision, *see, e.g., United States* v. *Addonizio*, 442 U.S. 178, 188-89 (1979); *Jones* v. *United States*, 419 F.2d 593, 595 (8th Cir. 1969); *United States* v.

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[10] The text of the relevant portions of § 4205 is set forth at page 3, *supra*. Although § 4205 was repealed effective November 1, 1987, by Pub.L. 98-473, 98 Stat. 2027-31, § 218(a)(5), it is discussed herein in the present tense by virtue of § 235(b)(1)(A) of the same act, as amended by Pub.L. 100-182, 101 Stat. 1266, § 2(b)(1), which extended the life of § 4205 for persons, like petitioner, whose offenses were committed prior to the effective date of the Sentencing Reform Act and who were accordingly sentenced under the superceded system of indeterminate sentencing.

Price, 474 F.2d 1223, 1228, *reh. den.*, 484 F.2d 485 (9th Cir. 1973); *United States* v. *Busic*, 592 F.2d 13, 26 (2d Cir. 1978), a reading of the statute which is consistent with a recent explication by this Court of the sentencing and release system which preceded the enactment of the new sentencing guidelines:

> [W]ith the advent of parole, Congress moved toward a "three-way sharing" of sentencing responsibility by granting correction personnel in the Executive Branch the discretion to release a prisoner before the expiration of the sentence imposed by the judge. *Thus, under the indeterminate system, Congress defined the maximum, the judge imposed a sentence within the statutory range. . . . and the Executive Branch's parole official eventually determined the actual duration of imprisonment. . . .*
> Serious disparities in sentences, however, were common. . . . In 1973, the United States Parole Board adopted Guidelines that established a "customary range" of confinement. . . . Congress in 1976 endorsed this initiative through the Parole Commission and Reorganization Act, . . . an attempt to envision for the Parole Commission a role, at least in part, "to moderate the disparities in the sentencing practices of individual judges." . . . That Act, however, did not disturb the division of sentencing responsibility among the three Branches. *The judge continued to exercise discretion and to set the sentence within the statutory range fixed by Congress, while the prisoner's actual release date generally was set by the Parole Commission.*

Mistretta v. *United States*, 109 S.Ct. 647, 650-51 (1989) (citations omitted) (emphasis added). *See also United States* v. *Addonizio*, 442 U.S. 178, 188-89 (1979):

> The decision as to when a lawfully sentenced defendant shall actually be released has been committed by Congress, with certain limitations, to the discretion of the Parole Commission. . . . *Congress has decided that the Commission is in the best position to determine when release is appropriate, and in doing so, to moderate the disparities in the sentencing practices of individual judges. The authority of sentencing judges to select precise release dates is, by contrast, narrowly limited. The judge may set an early parole eligibility date*; but that guarantees only that the defendant will be considered at that time by the Parole Commission [emphasis added].

Moreover, the legislative history underlying § 4205 clearly indicates that § 4205(b) was intended solely as an "early release" provision and does not, in fact, authorize a sentencing judge to delay the time when a prisoner may be considered for parole. *See, e.g., United States* v. *Castonguay*, 843 F.2d 51, 55 (1st Cir.1988); *United States* v. *Fountain*, 840 F.2d 509, 521-22 (7th Cir.), *cert. denied*, 109 S.Ct. 533 (1988); *United States* v. *DiPasquale*, 859 F.2d 9, 11-12 (3d Cir.1988). *See generally* S. Rep. No. 2031, 85th Cong., 2d Sess. (1958) and H.R. Conf. Rep. No. 2579, 85th Cong., 2d Sess. (1958), *reprinted in* 1958 U.S. Code Cong. and Admin. News 3891.

In recent years, however, the Courts of Appeals which have considered the issue of whether § 4205(b) authorizes a sentencing judge to dictate that parole eligibility be postponed beyond the ten-year maximum eligibility date established by § 4205(a) have split decisively on the issue, with the First, Third, Sixth and Seventh Circuits answering the question in the negative, *see, e.g., United States* v. *Hagen*, 869 F.2d 277 (6th Cir.), *cert. denied*, 109 S.Ct. 3228 (1989); *United States* v. *DiPasquale*, 859 F.2d 9 (3d Cir. 1988); *United States* v. *Castonguay*,

843 F.2d 51 (1st Cir. 1989); *United States* v. *Fountain*, 840 F.2d 509 (7th Cir.), *cert. denied*, 109 S.Ct. 533 (1988) and the Eighth, Ninth, Tenth, and Eleventh Circuits answering the question in the affirmative, *see, e.g.*, *United States* v. *Berry*, 839 F.2d 1487 (11th Cir. 1988), *cert. denied*, 109 S.Ct. 863 (1989); *United States* v. *Gwaltney*, 790 F.2d 1378 (9th Cir. 1986), *cert. denied*, 479 U.S. 1104 (1987); *Rothgeb* v. *United States*, 789 F.2d 647 (6th Cir. 1986); *United States* v. *O'Driscoll*, 761 F.2d 589 (10th Cir. 1985), *cert. denied*, 475 U.S. 1020 (1986). With its decision in this case, the Fourth Circuit allied itself with the latter group, holding that the sentencing court possessed the power under § 4205(b) to mandate that Garcia serve eighteen years of his sentence before being considered for parole eligibility.

Despite the advent of determinate sentencing and the concomitant abolition of the Parole Commission and its role in establishing release dates, the divisive conflict which has developed between the circuits as to the proper construction of the relationship between § 4205(a) and § 4205(b) remains an issue which should and, indeed, must, in the interests of promoting the fair and uniform administration of the criminal justice system, be resolved by this Court. The Sentencing Reform Act was effective on November 1, 1987, *see, e.g.*, *Valladares* v. *Keohane*, 871 F.2d 1560, 1561 (11th Cir. 1989); *Lightsey* v. *Kastner*, 846 F.2d 329, 331-32 (5th Cir. 1988), *cert. denied*, 109 S.Ct. 807 (1989); *Romano* v. *Luther*, 816 F.2d 832, 837 (2d Cir. 1987), as to all offenses committed after that date, Pub.L. 100-182, 101 Stat. 1266, § 2(a), *amending* Pub.L. 98-473, 98 Stat. 2031, § 235(a)(1), Congress having "evinced an explicit intent that defendants who have been convicted of crimes committed prior to November 1, 1987, be sentenced under the old law." *United States* v. *Burgess*,

858 F.2d 1512 (11th Cir. 1988).[11] While the role of the Parole Commission has been eliminated as to persons sentenced under the new sentencing guidelines system, Congress established a five-year transition period during which the Parole Commission must discharge its final responsibilities toward those persons sentenced under pre-existing law, Pub.L. 98-473, 98 Stat. 2032-33, § 235(b)(1)-(4); *see, e.g., Romano* v. *Luther*, 816 F.2d at 837; *Stange* v. *U.S. Parole Commission*, 875 F.2d 760, 761-62 (9th Cir. 1989), requiring in § 235(b)(1), as amended by Pub.L. 100-182, 101 Stat. 1266, 2(b)(2), that

> The United States Parole Commission shall set a release date, for an individual who will be in its jurisdiction the day before the expiration of five years after the effective date of this Act, pursuant to section 4206 of title 18, United States Code. . . .

Under this provision, the Parole Commission must effectively convert the prior indeterminate sentence into a determinate sentence with a fixed release date, *see, e.g., United States* v. *Fountain*, 840 F.2d 509, 518 n.2 (7th Cir. 1988), for all persons similarly situated to Garcia who remain incarcerated in November, 1992.

The result sought to be achieved by the Sentencing Reform Act was the elimination of the sentencing disparities which had characterized the indeterminate sentencing system. See S. Rep. No. 98-225, 98th Cong. 1st Sess. (1983) at 38, 65; *see also Mistretta* v. *United States*, 109 S.Ct. at 651-52. Failure to resolve the current conflict regarding the proper interpreta-

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[11] In light of the five-year federal statute of limitations for most offenses, 18 U.S.C. § 3282, the number of persons currently incarcerated pursuant to "old sentences" will be increased for at least three more years by conviction and sentencing of additional defendants whose offenses were complete prior to November 1, 1987, but who have not yet been indicted and/or tried.

tion of § 4205 will serve to perpetuate the very disparities which Congress sought to eliminate in that defendants whose sentences mandate postponement of parole eligibility to a period beyond the ten years provided by § 4205(a) will be converted to determinate sentences which vastly exceed the conversions of sentences imposed in the circuits which hold the ten-year parole eligibility provision of § 4205(a) to be controlling, and which will in all likelihood vastly exceed most sentences imposed under the guidelines. *See, e.g., United States* v. *Gwaltney, supra* (defendant ordered to serve at least 30 years of 90-year sentence before becoming eligible for parole); *United States* v. *Berry, supra,* (defendant to serve 59 years of 180-year sentence before parole eligibility); *Rothgeb* v. *United States, supra* (defendant to serve 69 years of 210-year sentence before parole eligibility); *United States* v. *O'Driscoll, supra* (parole eligibility postponed by sentencing judge to 99 years of 300-year sentence); *United States* v. *Whitworth,* 856 F.2d 1268 (9th Cir. 1988), *cert. denied,* 109 S.Ct. 1541 (1989) (60 years of 365-year sentence mandated to be served).[12] Several courts have already indicated a conclusion that nothing in § 235(b)(3) will affect the parole eligibility date established by the prisoner's sentence, and that such prisoners will remain subject to the parole eligibility *or ineligibility* in effect under their particular sentence, *see, e.g., Lightsey* v. *Kastner,* 846 F.2d at 330-31, 332; *Valladares* v. *Keohane,* 871 F.2d at 1563, which will include the perpetuation of any mandatory minima imposed. *See, e.g., United States* v. *Fountain,* 840 F.2d at 518 n.2. *Cf. Farese* v. *Story,* 823 F.2d 975 (6th Cir. 1987). The Parole Commission has apparently adopted this

[12] The resultant disparities will be heightened by the fact that persons serving life sentences are eligible for parole after ten years pursuant to § 4205(a). *See, e.g., United States* v. *Kinslow,* 860 F.2d 963, 969 (9th Cir. 1988), pet'n for cert. filed May 17, 1989; *Rothgeb* v. *United States,* 789 F.2d at 651; *United States* v. *Fountain,* 840 F.2d at 518; *United States* v. *Castonguay,* 843 F.2d at 54.

position in regulations promulgated to effectuate § 235(b)(3). 28 C.F.R. § 2.64(d).

This Court should grant certiorari to resolve the split among the circuits which has developed with respect to this issue, resolution of which is critical to the fair and even-handed administration of criminal justice in the federal system.

Conclusion.

For all of the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Appendix A.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88-5100

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ANTONIO JAVIER GARCIA,
Defendant-Appellant.

ORDER

There having been no request for a poll of the court on the petition for rehearing en banc, it is accordingly ADJUDGED and ORDERED that the petition for rehearing en banc shall be, and it hereby is, denied.

The panel has considered the petition for rehearing and is of opinion it is without merit.

It is accordingly ADJUDGED and ORDERED that the petition for rehearing shall be, and it hereby is, denied.

With the concurrences of Judge Russell and Judge Kellam.

/s/ H.E. Widener, Jr.
For the Court

Appendix B.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88-5100

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ANTONIO JAVIER GARCIA, A/K/A Tony,
Defendant-Appellant.

Appeal from the United States District Court for the District of South Carolina, at Aiken. Charles E. Simons, Jr., Senior District Judge. (CR-87-313)

Argued January 10, 1989 Decided May 15, 1989

Before RUSSELL and WIDENER, Circuit Judges, and KELLAM, Senior United States District Judge, sitting by designation.

Kimberly Homan (ZALKIND, SHEKETOFF, HOMAN, RODRIGUEZ & LUNT on brief) for Appellant. Alfred William Walker Bethea, Jr., Assistant United States Attorney (Vinton D. Lide, United States Attorney, on brief), for Appellee.

PER CURIAM:

Garcia appeals his conviction on one count of conspiracy and three counts of possession with intent to distribute and the distribution of cocaine. We affirm the conviction.

In March of 1988, Garcia was tried and convicted on the four counts alleging his involvement in a conspiracy to distribute and the possession and distribution of substantial quantities of cocaine. One of the principals in the conspiracy was William "Dickie" Hunt, who, before dealing in cocaine, had distributed marijuana for one Casey Strickland. Hunt testified that he met Miguel Valdes while on a trip to Florida to pick up some marijuana for Strickland. Through Valdes, Hunt met Tony Garcia while on a similar trip to pick up cocaine. Hunt testified that Garcia delivered a part of that shipment of cocaine for Hunt to transport back to South Carolina.

Hunt met John Wright in 1984. From a farm acquired by Wright at Aiken, South Carolina, the two carried on a partnership of distributing marijuana with distribution into South Carolina, Ohio, Georgia and Pennsylvania. Hunt requested, and began receiving from Valdes, cocaine, on credit, to transport to South Carolina with return of the payment a few days thereafter. He testified that if Garcia, on occasion, did not have enough cocaine for Valdes to give to Hunt that Garcia would leave and return with more.

Valdes also set up a cocaine processing lab at Clewiston, Florida, with which Hunt was also involved. One Brittingham, as well as Valdes, Hunt and Gerald Weathersbee, a driver for the group, entered into plea agreements with the government and as a result thereof testified against Garcia.

Hunt's group transported and distributed cocaine from Florida to South Carolina and other destinations from 1983 until 1986, most of which was supplied by Valdes and was distributed in South Carolina. Valdes testified as to Garcia's involvement in the network and as to each count.

Garcia contends that his sixth amendment right to confrontation was violated by the trial court's prohibition of cross-examination of two government witnesses, Weathersbee and Brittingham, concerning part of their plea agreement. The government included in the plea agreements that the agreement itself was expressly contingent upon the witnesses' successful completion of a polygraph examination. Garcia's counsel was not allowed to explore that part of the plea agreements in front of the jury. Neither was the jury, however, told anything about a polygraph in connection with the plea agreement. Apparently, polygraph tests administered to Weathersbee and Brittingham prior to the time they signed their plea agreements showed signs of deception.

A criminal defendant has a right to cross-examine a witness in order to undermine the credibility of that witness by highlighting the possible influence of bias on his testimony. Wide latitude should be allowed such a defendant. *Hoover* v. *State of Maryland*, 714 F.2d 301, 305 (4th Cir. 1983). It is within the discretion of the trial judge in light of the confrontation clause to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues or interrogation that is repetitive or only marginally relevant. *Delaware* v. *Van Arsdall*, 475 U.S. 673, 679 (1986).

The standard with respect to the use of polygraph evidence in this circuit is that the results of the examination or even a reference to the fact that a witness has taken a polygraph examination is not admissible. *United States* v. *Tedder*, 801 F.2d 1437, 1444 (4th Cir. 1986). Further, this court has instructed that polygraph provisions appearing in plea agreements should be redacted by the trial court before the plea agreement is allowed into evidence. *United States* v. *Herrera*, 832 F.2d 833, 835 (4th Cir. 1987). The reasoning underlying our rule is that inclusion of the provision by the government and bring-

ing the same to the attention of the jury constitutes improper bolstering of the witness's testimony.

Garcia argues that as the plea agreements contain the condition of successfully completing polygraph examination, the government witnesses subject to the agreements are unfairly biased toward the government. Garcia, in effect, is arguing that not only is the government using the plea agreement against the witnesses to avoid deviation from the truth, but that the additional requirement of passing the polygraph gives the witnesses the incentive to testify favorably for the government, regardless of the truth.

We think the argument fails for two reasons. First, the logic of the same is rather shaky. If a witness shades his testimony toward the government and varies from the truth, the polygraph, assuming its proper operation, would pick that up. Also, and just as important, we think that the rule in this circuit is fair to both sides and that, at least, unless and until polygraph results are admissible into evidence, the restriction of any inquiry into them is a reasonable restriction on cross-examination as it is on direct examination, and does not violate the Sixth Amendment.

Garcia next argues that the trial court erred by admitting evidence concerning his previous contacts and transactions with his coconspirators and others. The evidence to which the defendant objects is Hunt's testimony with respect to a 1983 transaction in which Hunt states (apparently corroborated by Valdes) that he met Garcia at Valdes' house when Garcia delivered cocaine; evidence of a January 1987 transaction where Garcia again delivered quantities of cocaine; and evidence of the relationship between Garcia and other individuals alleged to be Garcia's suppliers but who were not coconspirators. The district court admitted the evidence under Fed.R.Evid. 404(b).

In *United States* v. *Rawle*, 845 F.2d 1244 (4th Cir. 1988), in which a similar claim of error was made in the context of a drug conspiracy case, the evidence of prior bad acts was properly introduced under Rule 404(b) to show knowledge, common scheme or plan as there was sufficient similarity between the prior bad acts and the alleged acts of the defendant. *Rawle* at 1247-1248. In reaching this conclusion, this court discussed the purpose and use of Rule 404(b). The rule provides that "[e]vidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith." Under the rule, however, prior bad acts are admissible if they are relevant to an issue other than character; necessary; and reliable. *Rawle* 845 F.2d at 1247 (quoting *United States* v. *Greenwood*, 796 F.2d 49, 53 (4th Cir. 1986)).

The evidence is relevant under 404(b) if it is sufficiently related to the charged offense, as was the evidence here which describes transactions involving Garcia as the supplier of cocaine. The evidence is necessary and admissible where it is an essential part of the crimes on trial or where it furnishes part of the context of the crime as here, where Garcia's role in supplying the cocaine was a necessary element in what was an ongoing business of distribution. The remaining factor is that of reliability, and we note that the accounts and details of Garcia's involvement were virtually the same from the witnesses; thus, it would have been difficult for the witnesses to have fabricated his involvement to curry favor with the government. We are of opinion the bad act evidence was admissible under *Rawle*.

Garcia next argues that the trial court was without authority to extend the time for which he would be eligible for parole. Garcia was sentenced on Count 1 to a term of 60 years and on each of Counts 2-4 to a term of 20 years. The 20 year terms are to be served concurrently with each other but consecu-

tively to the 60 year sentence. The court required that Garcia serve 18 years before becoming eligible for parole pursuant to 18 U.S.C. § 4205(b)(1).

Section 4205(b) provides, in pertinent part, that upon entering a judgment of conviction, the sentencing court, "when in its opinion the ends of justice and the best interest of the public require that the defendant be sentenced to imprisonment for a term exceeding one year, may (1) designate in the sentence of imprisonment imposed a minimum term at the expiration of which the prisoner shall become eligible for parole, which term may be less than but shall not be more than one-third of the maximum sentence imposed by the court . . . ." Garcia argues that § 4205(b) is not a provision that falls within the exception stated in § 4205(a)[1] and that accordingly he must be eligible for parole consideration at the end of ten years under § 4205(a).

Having examined the cases, and we note there are different interpretations among the circuits, we are of opinion that § 4205(b) gives the sentencing court the authority to set a defendant's eligibility for parole at any point up to one-third of the sentence of a definite term of years imposed. We think § 4205(b) provides the statutory sentencing alternative contemplated by the exception stated in § 4205(a).[2] See *United*

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[1] 18 U.S.C.A. § 4205(a) provides:

> Whenever confined and serving a definite term or terms of more than one year, a prisoner shall be eligible for release on parole after serving one-third of such term or terms or after serving ten years of a life sentence or of a sentence of over thirty years, except to the extent otherwise provided by law.

[2] Accord: *United States* v. *Whitworth*, 856 F.2d 1268 (9th Cir. 1988); *United States* v. *Petary*, 857 F.2d 458 (8th Cir. 1988); *United States* v. *Berry*, 839 F.2d 1487 (11th Cir. 1988); *United States* v. *Gwaltney*, 790 F.2d 1378 (9th Cir. 1986), cert. den. 479 U.S. 1104 (1987); *Rothgeb* v. *United States*, 789 F.2d 647 (8th Cir. 1986); *United States* v. *O'Driscoll*, 761 F.2d 589 (10th Cir. 1985), cert. den. 475 U.S. 102), reh. den. 475 U.S. 1112 (1986).

[footnote continued on next page]

States v. *Addonizio*, 442 U.S. 178, 189, n.15 (1979). As the 18 years set by the trial court, after which Garcia is eligible for parole, is within one-third of the term of years imposed, the trial court did not act outside the scope of its authority.

We have considered the remaining issues of which Garcia complains and are of opinion they are without merit.

Accordingly, the judgement of conviction is

AFFIRMED.

Contra: *United States* v. *Dipasquale*, 859 F.2d 9 (3rd Cir. 1988); *United States* v. *Castonguay*, 843 F.2d 51 (1st Cir. 1988); *United States* v. *Fountain*, 840 F.2d 509 (7th Cir. 1988).

(2)

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No. 89-245

In the Supreme Court of the United States

OCTOBER TERM, 1989

ANTONIO JAVIER GARCIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court violated petitioner's rights under the Confrontation Clause of the Sixth Amendment by prohibiting defense counsel from cross-examining two government witnesses regarding the results of polygraph examinations they had taken.

2. Whether the district court had the authority under former 18 U.S.C. 4205 (1982) to sentence petitioner, who was convicted of distributing more than 150 kilograms of cocaine, to an 18-year minimum term of imprisonment.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The per curiam opinion of the court of appeals (Pet. App. 2a-8a) is unpublished, but the decision is noted at 875 F.2d 316 (Table).

JURISDICTION

The judgment of the court of appeals was entered on May 15, 1989. A petition for rehearing was denied on June 13, 1989 (Pet. App. 1a). The petition for a writ of certiorari was filed on August 11, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of South Carolina, petitioner was convicted

on one count of conspiracy to possess and to distribute more than five kilograms of cocaine, in violation of 21 U.S.C. 846, and on three substantive counts of possession and distribution of cocaine, in violation of 21 U.S.C. 841(a)(1) and 841(b)(1)(A). He was sentenced to 60 years' imprisonment on the conspiracy count to be followed by 20 years' imprisonment on one substantive count, and to concurrent 20-year prison terms on each of the remaining counts. Pursuant to 18 U.S.C. 4205(b), the district court specified that petitioner would not be eligible for parole for 18 years. Petitioner was also sentenced to concurrent lifetime special parole terms on the three substantive counts, and he was ordered to pay a $4,000,000 fine on the conspiracy count. C.A. App. 7-11.

1. The evidence at trial showed that between 1983 and 1987 petitioner supplied more than 150 kilograms of cocaine to Miguel Valdes of Miami. C.A. App. 168-169, 456, 528, 530-531, 562, 570; see also *id.* at 793. Valdes distributed the cocaine. He paid Gerald Weathersbee and Richard Brittingham to transport the cocaine to its ultimate destination. C.A. App. 179-180, 568-569.

In 1986, Weathersbee was arrested by the FBI in Augusta, Georgia, in possession of four kilograms of cocaine. C.A. App. 477-480. He was given a polygraph examination by the FBI in 1987 regarding information that he had supplied about the illegal organization. Among other things, he affirmed that he was just a driver for the organization, and he denied that he had withheld information regarding assets that he had received from the organization. C.A. Supp. App. 15-16. When the FBI confronted him with the examiner's conclusion that he had responded deceptively to those questions, Weathersbee admitted that he may have been more than a driver, but he denied that he was hiding assets. *Id.* at 16. He suggested that his physiological responses indicating deception may have been caused by

the fact that his wife knew about his drug activities, and he had hoped to conceal that fact. *Id.* at 17.

After the polygraph examination, Weathersbee entered into an agreement with the United States Attorney for the District of South Carolina (C.A. App. 114J-114P), where a large amount of the cocaine that petitioner supplied was distributed. He agreed to plead guilty to one count of conspiracy to possess and to distribute cocaine in exchange for the government's agreement to recommend a sentence not to exceed 12 years' imprisonment. Weathersbee also agreed to cooperate with the government. In addition, he agreed to submit to further polygraph examinations. *Id.* at 1140. The United States Attorney for the District of South Carolina regularly requires defendants to agree to submit to polygraph examinations as part of plea agreements in drug cases; he has found them useful in uncovering drug-related assets. C.A. Supp. App. 2. Weathersbee, however, was never examined pursuant to the plea agreement.

Brittingham was arrested by the FBI in Fort Mitchell, Kentucky, in 1987, after his associates distributed one kilogram of cocaine they had obtained from him. C.A. Supp. App. 7. He was given a polygraph examination by the FBI during which he supplied information about the illegal organization in which petitioner participated. The test indicated that he had given deceptive responses to a number of questions, none of which involved petitioner. Brittingham explained that while he had told the FBI about all of his narcotics transactions, he had concealed the identity of the individuals to whom he sold single ounces of cocaine, including a nephew. *Id.* at 8. The FBI subsequently conducted another polygraph examination, which also showed signs of deception. Brittingham explained that he had concealed that he had sold two ounces of cocaine to another nephew and that he had given some cocaine to his son. *Id.* at 11-12.

Like Weathersbee, Brittingham entered into a plea agreement (C.A. App. 114C-114I) with the United States Attorney for the District of South Carolina. Brittingham agreed to plead guilty to a cocaine conspiracy charge in exchange for the government's recommendation that any prison sentence be concurrent with the prison sentences that would be imposed in two pending cases. The agreement included provisions requiring Brittingham to cooperate and to submit to further polygraph examinations. *Id.* at 114E-114F, 114H. He was never examined pursuant to the agreement.[1]

2. Petitioner filed a motion in limine asking that he be permitted to cross-examine Weathersbee and Brittingham regarding the fact that their plea agreements contained requirements that they submit to polygraph examinations. He specifically asked that he be permitted to question them about having responded deceptively to the polygraph examinations that were conducted prior to the plea agreements and about the government's failure to administer polygraph examinations pursuant to the agreements. Petitioner contended that such cross-examination would call into question the credibility of the witnesses. C.A. App. 12-17, 90. Petitioner did not contend (as he now does (see Pet. 20-21)) that the polygraph provisions of the plea agreements showed that Weathersbee and Brittingham were biased.

The district court held that polygraph tests could not be mentioned during trial for any purpose. C.A. App. 90. The court stated, however, that defense counsel could ask any witness about any statement he had made during a polygraph examination as long as he did not mention the polygraph examination. *Id.* at 90-91. Defense counsel was

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[1] Brittingham also entered into a plea agreement with the United States Attorney for the Southern District of Ohio. Because that plea agreement was not entered into evidence, it is not relevant to this case.

also allowed to question witnesses about the provisions of the plea agreements other than the polygraph provisions.

At trial, both Weathersbee and Brittingham testified for the government. Defense counsel cross-examined both of them extensively, focusing on the fact that they had not mentioned petitioner in their initial interviews with the FBI. C.A. App. 488, 491-493, 505-506, 595, 598-599. Valdes also testified at length about petitioner's role as supplier of the cocaine he distributed. *Id.* at 293-298, 304-309, 317-321, 330-333. Valdes's wife and William Hunt, who arranged for much of the cocaine to be shipped to South Carolina and distributed it there, also testified about petitioner's role in the drug operation. *Id.* at 168, 175-179, 528, 530-531, 538-539, 547. In addition, the government presented telephone records showing hundreds of calls among the conspirators. *Id.* at 159. The evidence also showed that petitioner had sold Valdes a car with a secret compartment for carrying drugs. *Id.* at 310.

3. The court of appeals affirmed in an unpublished per curiam opinion. Pet. App. 2a-8a. It held that petitioner's Sixth Amendment right to confront the witnesses against him was not violated by the district court's prohibition against cross-examining Weathersbee and Brittingham concerning their polygraph examinations. *Id.* at 4a. The court relied on its decision in *United States* v. *Tedder*, 801 F.2d 1437, 1444 (4th Cir. 1986), which held that evidence of the results of a polygraph test (or the fact that such a test had been administered) is inadmissible, and on its decision in *United States* v. *Herrera*, 832 F.2d 833, 835 (4th Cir. 1987), which required that plea agreements be redacted to delete polygraph provisions before the agreements are entered into evidence. Pet. App. 4a-5a.

The court also held that the district court correctly interpreted former 18 U.S.C. 4205(b)(1) (1982) to permit the imposition of a minimum term of imprisonment of 18 years.

Section 4205(b)(1), which has been repealed, provided that a court could "designate in the sentence of imprisonment imposed a minimum term at the expiration of which the prisoner shall become eligible for parole, which term may be less than but shall not be more than one-third of the maximum sentence imposed by the court." Since the 18-year minimum sentence imposed on petitioner was less than one-third of petitioner's 80-year sentence, the court found the sentence to be authorized by Section 4205(b)(1). The court rejected the argument that 18 U.S.C. 4205(a) (1982) limited the minimum sentence to ten years' imprisonment. The court noted that Section 4205(a) provides for parole eligibility in ten years or less " 'except to the extent otherwise provided by law,' " and it concluded that "§ 4205(b) provides the statutory sentencing alternative contemplated by § 4205(a)." Pet. App. 7a & n.1.

ARGUMENT

1. Contrary to petitioner's primary contention (Pet. 7-21), his rights under the Confrontation Clause were not violated by the district court's decision not to allow him to raise the issue of the polygraph examinations Weathersbee and Brittingham had taken. It is well established, of course, that the right of a defendant to confront the witnesses against him includes the right to impeach their credibility through cross-examination. *Davis* v. *Alaska*, 415 U.S. 308, 315-316 (1974). It is equally well established, however, that courts retain discretion to place reasonable limits on cross-examination to prevent, among other things, confusion of the issues or the introduction of repetitive or only marginally relevant evidence. *Delaware* v. *Van Arsdall*, 475 U.S. 673 (1986). The evidence petitioner unsuccessfully sought to introduce was confusing, of marginal relevance, and repetitive.

As petitioner acknowledges, the courts have a "pronounced inhospitability" (Pet. 19) to polygraph evidence. That is because there are serious questions regarding the reliability of the results of polygraph tests. See, *e.g.*, *United States* v. *Givens*, 767 F.2d 574 (9th Cir. 1985). Accordingly, the introduction of polygraph evidence usually leads to the introduction of contradictory (and confusing) expert testimony as to the reliability of polygraph evidence in general and in the case at bar. The Fourth Circuit is among the courts that have concluded that polygraph evidence is *per se* inadmissible. *United States* v. *Tedder*, *supra*; see also *United States* v. *Murray*, 784 F.2d 188 (6th Cir. 1986); *Brown* v. *Darcy*, 783 F.2d 1389, 1394-1395 (9th Cir. 1986); *United States* v. *Masri*, 547 F.2d 932, 936 (5th Cir.), cert. denied, 434 U.S. 907 (1977). While some courts of appeals allow the introduction of polygraph evidence in some circumstances (see, *e.g.*, *United States* v. *Hall*, 805 F.2d 1410, 1416-1417 (10th Cir. 1986)), it would only be in a most unusual case that a district court in those circuits would abuse its discretion by refusing to admit such evidence. *Brown* v. *Darcy*, 783 F.2d at 1394-1395 (the court could find "no United States Court of Appeals decision which * * * concluded that the refusal to admit polygraph evidence at trial was an abuse of discretion)."[2]

The district court did not err by refusing to allow petitioner to question Weathersbee and Brittingham about their polygraph examinations. Nothing in the record suggested that either witness had lied in the course of the polygraph examinations about petitioner's involvement in the con-

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[2] The Eleventh Circuit recently held that polygraph evidence is not *per se* inadmissible, but emphasized that its decision should not "be construed to preempt or limit in any way the trial court's discretion to exclude polygraph expert testimony on other grounds." *United States* v. *Piccinonna*, No. 86-5335 (Sept. 28, 1989), slip op. 17 (en banc).

spiracy. Rather, it appears that they were trying to conceal that family members knew of their drug trafficking activities and, in some cases, participated in them. C.A. Supp. App. 8, 11-12, 15-17. Moreover, as the district court made clear (C.A. App. 90-91), petitioner was free to ask the witnesses about any of their prior statements and about their plea agreements; in fact, the witnesses were each cross-examined at length. The fact that polygraph examiners had concluded that Weathersbee and Brittingham had responded deceptively to certain questions not relating to petitioner was of only marginal relevance, if any, to petitioner's defense.

Furthermore, to the extent that the plea agreement provisions allowing the government to conduct additional polygraph tests might be considered relevant to whether the witnesses were biased, it would have been cumulative. The jury was already aware that the witnesses had received the benefits of plea bargains that resulted in a reduction in the number of charges and an agreement to cap the witnesses' sentences, that the witnesses had agreed to testify as part of the agreements, and that they could be prosecuted for perjury. Nothing further would be gained by allowing the defense to show that the government could force Weathersbee and Brittingham to submit to additional polygraph examinations. Indeed, if the government had sought to introduce the polygraph provisions, the district court presumably would have refused to admit them on the ground that they constituted improper bolstering of the witnesses' testimony. See Pet. App. 4a-5a.[3]

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[3] There is no basis for petitioner's suggestion (Pet. 8) that the fact that Weathersbee and Brittingham had given deceptive answers during previous polygraph tests gave the government some special power over them. It is important to keep in mind that they had not given deceptive answers during a polygraph examination conducted pursuant to the agreements at issue. Nor had they given deceptive answers with respect to petitioner. Finally, the witnesses presumably could protect themselves

Review is not warranted to resolve a conflict between the decision here and the First Circuit's decision in *United States* v. *Lynn*, 856 F.2d 430 (1988), which petitioner describes as "the only reported federal decision to directly confront and decide this issue." Pet. 17. In *Lynn*, the court stressed that the district court's refusal to allow cross-examination concerning a polygraph provision in a plea agreement, "seen in the context of appellant's other claimed procedural flaws, had a compounded and unquestionably prejudicial effect." 856 F.2d at 434. Here, in contrast, there is no other claim of procedural error and, as we have shown, petitioner was not prejudiced. Moreover, the district court in *Lynn* allowed the government to introduce the entire plea agreement into evidence, including the polygraph provisions, and the witness stated that he " 'had to pass a polygraph test' " before the court cut off the questioning. *Id.* at 432. The court of appeals stated that it could not "ignore the government's tactic of drafting the plea agreement with the polygraph requirement clause, revealing the entire agreement to the jury (and thereby implying the witness' motivation to tell the truth), then objecting to defense attempts to expose the full implications of the clause." *Id.* at 433. In this case, the plea agreements were not entered into evidence and neither Weathersbee nor Brittingham suggested in his testimony that he had passed a polygraph test. In *Lynn*, on the other hand, once the polygraph provisions had been admitted into evidence and the witness had stated that he had taken a polygraph test, it was unfair not to allow the defense to point out that the witness had in fact responded deceptively.

2. As petitioner states (Pet. 22-28), the courts of appeals have split over the question whether former 18 U.S.C. 4205(b) (1982) permitted a district court to provide that

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by telling the truth in any polygraph examination conducted pursuant to the plea agreements.

a convicted defendant would not be eligible for parole for a period of time up to one-third of the total sentence imposed. A number of courts have agreed with the court below. *United States* v. *Whitworth*, 856 F.2d 1268 (9th Cir. 1988), cert. denied, 109 S. Ct. 1541 (1989); *United States* v. *Berry*, 839 F.2d 1487 (11th Cir. 1988), cert. denied, 109 S. Ct. 863 (1989); *United States* v. *Gwaltney*, 790 F.2d 1378 (9th Cir. 1986), cert. denied, 479 U.S. 1104 (1987); *Rothgeb* v. *United States*, 789 F.2d 647 (8th Cir. 1986); *United States* v. *O'Driscoll*, 761 F.2d 589 (10th Cir. 1985), cert. denied, 475 U.S. 1020 (1986)). Other courts have concluded that the ten-year ceiling on the period of parole ineligibility set by former 18 U.S.C. 4205(a) (1982) applies in cases like this one. *United States* v. *Hagen*, 869 F.2d 277 (6th Cir.), cert. denied, 109 S. Ct. 3228 (1989); *United States* v. *DiPasquale*, 859 F.2d 9 (3d Cir. 1988); *United States* v. *Castonguay*, 843 F.2d 51 (1st Cir. 1988); *United States* v. *Fountain*, 840 F.2d 509 (7th Cir.), cert. denied, 109 S. Ct. 533 (1988). Nevertheless, the issue does not warrant review by this Court because it is of no continuing importance. Section 4205 was repealed effective November 1, 1987, by the Sentencing Reform Act of 1984, Pub. L. 98-473, §§ 218(a)(5), 235, 98 Stat. 2027, 2031 (1984), as amended by the Sentencing Reform Amendments Act of 1985, Pub. L. 99-217, § 4, 99 Stat. 1728 (1985). That Act prospectively abolishes parole, instituting in its place a system of determinate sentencing. As a result, for all offenses committed after November 1, 1987, the issue presented in this case cannot arise, since all such offenders will be subject to sentencing under the Sentencing Guidelines and will not be subject to parole.

Moreover, petitioner's sentence is consistent with the sentences similarly situated offenders will receive under the federal Sentencing Guidelines that apply to offenses committed after November 1, 1987. The 18-year minimum period that petitioner must serve is within the applicable

range under the guidelines for a first-time offender convicted of an offense involving 50 kilograms or more of cocaine.[4] Petitioner would undoubtedly receive a 4-level adjustment under the guidelines as an organizer or leader of criminal activity (see United States Sentencing Commission, *Guidelines Manual* § 3B1.1(a), at 3.3 (Oct. 1987)), raising the applicable sentencing range to 292-365 months' imprisonment, or 24 to 30 years. Therefore, in light of the now-applicable guideline sentences for similar conduct, it is doubtful that petitioner would fare better at the hands of the Parole Commission even if he were made technically eligible for parole consideration after ten years rather than after 18 years.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General

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OCTOBER 1989

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[4] For such a crime, the offense level under the Sentencing Guidelines (§ 2D1.1) is 36, petitioner's criminal history category would be I, and the applicable guideline range would be 188-235 months' imprisonment, or 15 to 19 years. See United States Sentencing Commission, *Guidelines Manual* § 2D1.1, at 2.37, 2.38; ch. 5, at 5.2 (Oct. 1987).

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